charged by LECs to CMRS providers for Type II (carrier) interconnection, after detailed consideration of State law and telecommunications policy. (Type I interconnection is available under contract.) NET complies in full with this direction of the Maine PUC. In New Hampshire, the terms and conditions of cellular interconnection (including NET charges) are subject to tariff, whether of Type I or Type II variety. These cellular access provisions were recently approved by the New Hampshire Public Utilities Commission.[34] The same is true in Massachusetts, i.e., interconnection charges are embodied in State-approved tariffs that were filed without CMRS objection. In Vermont, the State regulatory commission is currently conducting an evidentiary hearing proceeding in order to determine, inter alia, appropriate levels of LEC-CMRS interconnection charges.[35] Again, this is being done in connection with the development of broader regulatory policies for intrastate competition. During the pendency of these proceedings, both Type I and Type II interconnection charges are being applied pursuant to state tariffs. In Rhode Island, both Type I and Type II interconnection charges are applied pursuant to contract.

Clearly these State commissions are not prohibiting the entry of CMRS providers. Proof of this fact is that there are no pending CMRS interconnection complaints against

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[34] NYNEX Petition to Introduce Feature Group 2A, to Switch Type 1 Interconnection Service from Contract to Tariff as Flexpath Service and to Introduce a Company Code on the title page of NHPUC No. 79, DR 95-224, Order No. 21,844 dated October 2, 1995.

[35] Investigation into NET's tariff filing re: Open Network Architecture, including the unbundling of NET's network, expanded interconnection, and intelligent networks; Vt. Public Service Board Docket No. 5713, Proposed Decision: Phase I, released December 14, 1995.

NYT or NET, nor are there federal complaints against the mode or quality of State regulation.[36] Each State has further supported "reasonable" interconnection charges from its own perspective.[37] Now LECs, CMRS providers and the State commissions must revisit these decisions in view of new Congressionally-mandated principles and procedures. Going forward with future negotiations, NYNEX will begin these discussions from the statutory principles of non-discriminatory, cost-based, mutual and reciprocal charges. However, it is clear from past State conduct that the law does not support Commission preemption at this time.[38]

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36 It is significant that this interconnection has been provided by the NYNEX Companies to the satisfaction of even nonaffiliated wireless carriers. See, ex parte communication of SBS Communications, Inc. and Southwestern Bell Mobile Systems, Inc. (competitor of Bell Atlantic NYNEX Mobile Company in New England), dated December 7, 1995, stating that "SBMS has been able to obtain satisfactory interconnection with Illinois Bell, C&P and New England Telephone through negotiations."

37 Significantly, in the Massachusetts competition proceeding (IntraLATA Competition, D.P.U. 94-185), an economist representing Cellular One testified that "bill and keep" was inappropriate because it would not lead to economic efficiency and would not fairly compensate carriers for the use of their networks.

38 The NY PSC had earlier specifically advised the Commission that federal preemption of its regulation in this area would be "premature, unnecessary and unlawful." Comments of New York State Department of Public Service, CC Docket 94-54, RM-8012, filed August 25, 1994. See also, Petition for Reconsideration, GN Docket No. 93-252, filed May 13, 1994. The NY PSC's arguments, and those of every other State commission active in this area, have been strengthened immensely by the recent legislative judgment that this Commission has only limited authority "to preclude the enforcement of any regulation, order, or policy of a State commission" in this area. Section 251(d)(3), entitled "Preservation of State Access Regulations."

(2) The "General Pricing Principles" Of The NPRM Will Be Considered In The Negotiated Agreements

The NPRM next proceeds with a discussion of pricing principles, first addressing rate structure (NPRM ¶¶ 42-46) and then rate levels (NPRM ¶¶ 47-57). NYNEX agrees generally with the rate structure discussion as to dedicated/shared facilities, and the Commission's own acknowledgment that there are "theoretical and practical problems" associated with the recovery of capacity-related and non-capacity related costs in peak/off-peak rates.[39] The Commission to date and now the Congress have wisely left the resolution of such questions to the affected carriers.

The appropriateness of the new legislative scheme is made even more clear with reference to the rate levels that will be established by the carriers. The NPRM properly observes that "[e]conomists generally agree that prices based on LRIC [Long Run Incremental Costs] reflect the true economic cost of a service and give appropriate signals to producers and consumers and ensure efficient entry and utilization of the telecommunications infrastructure" (NPRM ¶ 47). Nevertheless, there are other important telecommunications policy issues at stake which create "difficulties" in pricing at LRIC (NPRM ¶ 48).[40]

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[39] Taylor Affidavit at pp. 25-27.

[40] NYNEX appreciates the Commission's interest in establishing the magnitude of the difference between "forward-looking LRIC" and the "historical costs of the network", but does not believe that a sufficient record for pricing can be established with haste in this proceeding. To whatever extent the Commission wishes to develop this area in its Access Charge Reform Proceeding for interstate costs, it should begin now to discuss this with industry representatives.

NYNEX agrees with the Commission that LRIC provides a "theoretical foundation for efficient pricing of interconnection and other network services." However, the ill-considered use of only this approach raises difficult pricing questions as to which services and which customers should be asked to pay for the common "costs of the network" in excess of LRIC.[41] The NPRM itself offers five different approaches in a non-exhaustive list (NPRM ¶¶ 50-54).

In the end, the NPRM recognizes that each of these approaches, and any other that might be proposed for "adoption" will impact "*telecommunications network subscribership and Universal Service*" (NPRM ¶ 55). For these precise reasons Congress has directed the resolution of these issues by the interconnecting carriers themselves under State commission jurisdiction.

(3) "Bill and Keep" Should Not Be Mandated By The Commission

The Commission has tentatively decided to mandate a "bill-and-keep" arrangement for LEC-CMRS interconnections (NPRM ¶¶ 60-62). It further concludes that this arrangement should cover both peak and off-peak periods (NPRM ¶ 60). The Commission cites three bases for its tentative conclusion: (1) administrative simplicity; (2) preventing the exercise of LEC market power; and (3) economic efficiency if either traffic is balanced or

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[41] The Commission notes that it has defined "long-run incremental costs as including "the full amount of incremental investment and expenses which would be incurred by reason of furnishing additional quantities of service, whether in a new or an existing service category." It further states that "in estimating LRIC, one "determine[s] prospectively the effect in total costs, including the effects on common costs . . . . of adding units of service" (cite omitted) (NPRM at ¶ 47, n. 62) (emphasis added). As emphasized by Dr. Taylor, this is a far superior economic approach to the consideration solely of total service LRIC. Taylor Affidavit at p 33.

interconnection costs approach zero (NPRM ¶ 61). As briefly discussed below (and as further detailed in Dr. Taylor's Affidavit), none of these bases provides a sound foundation for the proposal.[42]

(a) Administrative Simplicity Does Not Warrant "Bill and Keep"

The NPRM preference for interim "bill-and-keep" arrangements is based, at least in part, on the view that it is administratively simple and will avoid the cost of new accounting and billing systems (NPRM ¶ 61). However, the notion of avoiding costs depends first on the assumption that billing and accounting systems will not be required later and that the incremental costs of such systems are substantially beyond those otherwise needed by PCS carriers to rate calls, bill customers and process receivables (including the exchange of intercarrier "roaming" revenues).

The first premise cannot be relied upon because it fundamentally undermines the notion of "interim" action advanced in the NPRM. Moreover, as Dr. Taylor points out, there are strong reasons to believe that traffic imbalances will not rapidly equalize, if at all.[43] The second premise has not been demonstrated and is counter-intuitive. Certainly there has been no showing that prospective, incremental administrative cost savings exceed the substantial revenues in controversy. As above, there is a direct incremental

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[42] NYNEX does not object to setting the rates for dedicated transmission facilities based on existing access charges for similar facilities.

[43] Taylor Affidavit at pp. 10-11.

revenue loss of more than $48 million for the NYNEX Companies (based on 1995 traffic volumes) with little or no diminishment of costs.

In any event, if the wireless carrier desires, the NYNEX Companies are willing to measure traffic for them under a negotiated commercial agreement as they have done in New York. However, the administrative costs involved in such agreements should not be confused with the regulatory purpose of sending proper economic pricing signals.[44] The mandated "bill-and-keep" arrangement proposal violates this fundamental economic premise.[45]

(b) Regulation Constrains Any LEC Opportunity To Exert Market Power

The Commission also fears that LECs will exert market power in delaying or denying reasonable interconnection compensation arrangements (NPRM ¶ 58). As above, past State commission oversight and the prospective impact of the 1996 Act avoids any such opportunity. Further, NYNEX has repeatedly advised that it will immediately make current cellular carrier interconnection arrangements available to new PCS entrants, even while negotiating new agreements pursuant to Sections 251-252 of the 1996 Act. In any event, this speculative concern provides no sound economic basis to mandate -- as proposed here -- that "neither network can assess the other price that reflects its true costs."[46]

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[44] Further, there would be additional costs for the "rating" systems and updates imposed on the LECs even if they were only to collect the wireless carriers' airtime charges, as contemplated by the Commission (NPRM ¶ 59, n. 76).

[45] Taylor Affidavit at pp. 9-11

[46] Taylor Affidavit at p. 5.

(c) <u>Bill-And-Keep Would Be Economically Inefficient</u>

To begin, the mandated application of bill-and-keep to LEC-CMRS compensation arrangements does not satisfy the Commission's own goal of "cost-based pricing signals" (NPRM ¶ 4). As discussed in greater detail by Dr. Taylor, the adoption of this approach would be economically inefficient for at least four reasons. First, it would distort the interconnecting carriers' respective incentives to minimize the total costs of service, causing them to disregard the costs imposed on others and to focus only on minimizing their own costs. Second, it would assume without basis that all carriers have identical costs. Although an equal cost "surrogate" might be agreed upon in negotiations, it should not be compelled a priori. Third, the imposition of "bill-and-keep" would ignore the fact that lack of directional call balance is due to customer factors as well as system factors. That is, the cellular customer base by its very nature makes far more calls than they receive. The false incentive of "zero cost" LEC terminations will accentuate this imbalance, to the great disadvantage of LECs and their customers. Fourth, it would prevent incumbent LECs from recovering the contribution lost when they provide interconnection to CMRS competitors. As Dr. Taylor observes:

> "[t]he bill-and-keep method would permit entrants' customers to avoid paying this contribution despite the facts that (i) NYNEX will continue to maintain a network to fulfill provider of last resort responsibilities, (ii) NYNEX's network (or network elements) are still being used to provision the service offered by entrants, and (iii) NYNEX's retail customers (or its stockholders) must still provide this contribution."[47]

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[47] Taylor Affidavit at p. 12.

Brock Analysis: The Commission borrows upon the analyses provided by Dr. Gerald Brock in asserting that "bill-and-keep" arrangements may be economically justified if either (1) traffic is directionally balanced or (2) "actual interconnection costs are so low that there is little difference between a cost-based rate and a zero rate" (NPRM ¶ 61). It is accepted by the Commission and all parties that the first condition is not satisfied here. While the NPRM speculates as to the cause, it is not the result of LEC interconnection charges (NPRM ¶ 14). By CITA's own reckoning, these LEC charges amount to less than 10% of user airtime charges.

With respect to costs. Dr. Brock theorizes that off-peak costs are negligible and that "most of the minutes during a year impose no incremental cost on the local exchange because they occur at off peak times."[48] Beyond establishing charges on the economically inefficient basis embodied in "bill-and-keep" for off-peak periods, the NPRM proposes to mandate this system for peak period traffic as well, a period during which even Dr. Brock concedes that call termination has a substantial economic cost. This is economically unsound.[49]

State Decisions: Finally, the NPRM seems to find support for its proposals in the decisions of several State commissions. However, it fails to observe that some States

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[48] Gerald R. Brock, "Price Structure Issues in Interconnection Fees, March 30, 1995, prepared for Teleport Communications Group, page 5. There is no record basis for this assumption. On the contrary, the substantial discounts frequently provided by cellular carriers for evening and weekend service reveal that weekday peak period traffic predominates on wireless as well as wireline systems.

[49] Taylor Affidavit at p. 27

adopting "bill-and-keep" have conditioned its utility (e.g., Michigan limits this approach to traffic that is within five (5) percent of balance), some propose to "true-up" traffic differentials later (e.g., Connecticut), and still others have rejected it outright (e.g., Maryland).[50] Probably the most notable aspect of the discussion of State commission activity is that they have reasonably reached different conclusions. For the NYNEX Companies, it is most significant that none of its State regulatory commissions have supported this arrangement.

(d) The "Internet Model" Is Misunderstood And Misapplied

The Commission has set as its goal the adoption of policies "that are intended to create or replicate market-based incentives and prices" (NPRM ¶ 4). It has also been advised that the "Internet" system demonstrates that "bill-and-keep" is a naturally occurring result of free market intercarrier agreements (NPRM ¶ 11). As Dr. Taylor shows, there are significant differences between the Internet system and the switched public telephone network.[51] Among these are the different origins of each system (with the Internet established by public, not private funds), the different technologies employed (with the Internet employing packet-switching, not circuit-switching), the different approaches to capital recovery (with Internet private investment being recovered according to expected economic obsolescence, not historic "retirements" ratesetting) and,

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50 Taylor Affidavit at pp. 22-25.

51 Taylor Affidavit at pp. 12-17.

perhaps most importantly, the absence of social policy goals controlling the Internet, e.g., subscribership goals and universal access.

Moreover, even if the Internet were accepted as an appropriate model, the Commission has apparently been misinformed as to its functioning. In fact, while certain "backbone" providers of similar size and traffic generation may exchange comparable traffic without charge, others pay access charge equivalents and compensation is provided for transit services (i.e., carriage on a network between networks).[52] Perhaps most importantly, all commercial arrangements are voluntary, not compulsory.

Accordingly, while consideration of the "Internet model" is interesting, it cannot serve as a basis upon which to mandate "bill-and-keep" arrangements.

(4) "Bill And Keep" Would Be Inconsistent With The Commission's Own Goals

Perhaps most ironically, the adoption of a mandated bill-and-keep arrangements would frustrate even the Commission's own stated policies (NPRM ¶¶ 76-81). First, the "bill and keep" arrangement would be preferential. That is, the establishment of unique and more favorable compensation arrangements for CMRS providers would be totally inconsistent with the long term goal of equal charges for functionally equivalent services (NPRM ¶ 77). Second, the "bill and keep" would set up severe IXC arbitrage of LEC charges. That is, a LEC terminating rate of zero for CMRS providers would establish a clearly preferable path for other carriers (such as IXCs) to terminate their traffic to LECs

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[52] Taylor Affidavit at pp. 16-17.

via affiliated and non-affiliated wireless carriers. The Commission itself fully understands that such gaming of the process (called "arbitrage") causes uneconomic network behavior, solely for regulatory reasons, and will cause cost recovery burdens to shift to others. Id. Third, "bill and keep" would shift the cost burden to others. Significantly, the Commission has suggested that this burden of cost recovery might be shifted to LEC end users, perhaps through changes in the EUCL (NPRM ¶ 60). Although there may be merit in this approach, a broader record is required to allow full consideration of such rate structure changes.

Finally, although both the Commission and NYNEX favor symmetrical rates, mandated "bill and keep" clearly does not achieve this goal. That is, under "bill and keep" the net charges at a "rate of zero" would be equal. However, using the 86/14 traffic ratio for CMRS-generated vs. NYNEX-generated traffic, this would mean effective NYNEX charges at 16% of the CMRS rates. There is no basis in cost or policy for such disparate charges.

(5) The Adoption of "Bill-And-Keep" Would Require That The Commission Allow For Other Cost Recovery

If wireless carriers are to be exempted from any cost responsibility from building, repairing and updating the network serving the wireline customers they seek to reach, then either (1) others will have to pay the costs, or (2) such costs (and work operations) will have to be limited, deferred or denied. With respect to "others" paying the costs, the Commission has not decided who these other entities and customers should be. As it does so, it will have to address which services are more (or less) worthy of its developmental interests, and which customers can afford to pay more (or less) so that no uneconomic impact occurs and no societal goal is impeded, as well as other difficult issues. The Commission has raised these issues in its "pricing options" but each option has its limitations.[53] The proper place for these issues to be resolved with respect to interstate traffic is in the industry-wide Access Charge Reform Proceeding.

However, with respect to LEC work operations or investments limited, deferred or denied, the proper place for these intensely local service questions to be decided is in the proceedings of the respective States. Indeed, for the Commission to assume jurisdiction of this intrastate traffic would require the transfer of these related costs via the Part 36 separations process from the States to the federal jurisdiction, and a related "exogenous" adjustment of the respective LEC interstate "price caps." The Commission has not indicated how it would accomplish such cost transfers and rate adjustments. As above, the NPRM simply asserts "[u]nder bill and keep arrangements. . . . *each network recovers from its own end-users* the cost of both originating traffic delivered to the other network and terminating traffic received from the other network" (NPRM ¶ 60) (emphasis added).

[53] Dr. Taylor also provides a brief economic analysis of other pricing "options" under consideration in his Affidavit. (Taylor Affidavit at pp. 28-33.) Of these other "options" (NPRM ¶¶ 66-75), only the application to PCS providers of existing LEC-to-cellular rates is arguably necessary, i.e., to timely put in place nondiscriminatory rates applicable to new CMRS entrants. See, Separate Statement of Commissioner Andrew C. Barrett at p. 2, n. 4. NYNEX has already indicated that it would make such rates immediately available (NPRM ¶ 22). In addition, such carriers may choose to negotiate new agreements pursuant to the 1996 Act. The Commission should resist all invitations to do piecemeal ratesetting herein

However, absent corresponding regulatory changes, the NYNEX Companies would be left without intrastate rates to recover the underlying intrastate costs for the termination of traffic. In the absence of any evidence that such recovery has been provided for or is even probable, the Commission cannot rely on it.[54]

The Commission must consider the context in which its mandated rates must function and give consideration to the effect of its actions on the affected carriers.[55] The lack of provision in the NPRM for the impact of its change on LEC charges has the potential effect of forcing LECs to provide interconnection services without just compensation.[56] Further, this cost transfer will be exacerbated in 1996 and beyond as wireless services continue their significantly stronger relative growth rate, and as other wireline companies learn to "terminate" their traffic on LEC systems via an affiliated or non-affiliated wireless carrier to accomplish regulatory rate arbitrage.

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[54] See State Farm, 463 U.S. at 43 (normally, an agency rule which "runs counter to the evidence before the agency" is arbitrary and capricious).

[55] Cf. Federal Power Comm'n v. Conway Corp., 426 U.S. 271 (1976) (Commission had jurisdiction to consider alleged "price squeeze" on municipal utilities that both purchased at wholesale from and competed at retail with electric utility seeking increase in wholesale rates; Court affirmed the lower court which held that the market in which the municipal customers competed was part of the "'factual context in which the proposed wholesale rate will function'" and should be considered. Id. at 276).

[56] Forcing a carrier to provide certain services at non-compensatory rates without reasonable grounds is a denial of substantive due process. Northern Pacific Ry. Co. v. State of North Dakota, 236 U.S. 585 (1915); see Baltimore & Ohio Railroad Co. v. U.S., 345 U.S. 146 (1953) (discussing Northern Pacific).

B. Implementation Of Compensation Arrangements (NPRM ¶¶ 82-114)

The NPRM raises two questions regarding the implementation of its interim "bill-and-keep" approach. First, it inquires whether negotiated agreements, tariffs or some other approach should be used to create interconnection compensation arrangements and to make them public (NPRM ¶¶ 88-95). Second, it concludes that the Commission has the authority to preempt State commissions by mandating specific compensation rates even as to intrastate traffic (NRPM ¶¶ 111-112). As above, the "agreement or tariff" question has now been answered by the 1996 Act in favor of negotiated agreements. As to the issue of Commission versus State commission authority, this Commission may act on interstate rates but it may not preempt comparable State authority over intrastate LEC rates. This longstanding sharing of responsibility has been reaffirmed in the 1996 Act.

(1) The Communications Act Establishes State Jurisdiction Over Intrastate Communications, Including Intrastate LEC Interconnection Charges

The Commission considered various arguments urged by the parties with regard to preemption and tentatively concluded that its jurisdiction to preempt, to the extent it existed at all, rested on its authority to regulate entry of CMRS providers (and thus preempt state regulation which precludes or effectively precludes entry) and the purported inseparability of interstate and intrastate termination services (NPRM ¶¶ 111-112). As shown below, the Commission has not justified preemption on either ground.

The law is well established that the Communications Act contemplates a dual scheme of regulation, with this Commission regulating interstate communications and State commissions regulating intrastate communications. Specifically, Section 2(a) of the Act confers upon this Commission jurisdiction over "all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States . . . and to the licensing of all radio stations . . ." 47 U.S.C. § 152(a). Section 2(b) of the Act, however, limits the Commission's jurisdiction "with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carriers . . ." 47 U.S.C. Section 152(b). Further, Section 221(b) of the Act specifically reserves the power of the State commissions:

> "nothing in this chapter shall . . . give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission . . ." 47 U.S.C. Section 221(b).[57]

The Courts have previously held that the Commission has plenary jurisdiction over the physical interconnection of carriers. (North Carolina Util. Comm'n v. FCC, 537 F.2d 787

[57] Section 221(b) provides an exception inter alia for §332 which has been relied upon by some for a different conclusion. NRPM ¶¶ 100-104. While this exception is applicable in cases of State preclusion of CMRS market entry and State regulation of CMRS rates, it is inapplicable in this case to State regulation of intrastate LEC interconnection charges, as discussed infra.

(4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976) ["NCUC I"]; North Carolina Util. Comm'n v. FCC, 552 F.2d 1036 (4th Cir. 1977), cert. denied, 434 U.S. 874 (1977) ["NCUC II"]). But they have further held that, where costs are segregable and the dual jurisdictional approach of the Act can be maintained, the Commission does not have the authority to preempt State regulation of intrastate rates (Louisiana Pub. Serv. Comm'n v. FCC).[58] Accordingly, the Commission itself has properly limited its jurisdiction to interconnection charges for interstate communications:

> "Although we find that we have plenary jurisdiction over the physical interconnections between cellular and landline carriers, the actual costs and charges for the physical interconnections of cellular systems are suited to dual intrastate and interstate regulation. "Charges applicable to cellular interconnection are separable. As with telephone depreciation costs [at issue in Louisiana Pub. Serv. Comm'n v. FCC], it is possible to divide the actual interstate and intrastate costs of cellular interconnection. . . . Although we are not mandating a jurisdictional separations process for the cellular service unless it becomes necessary to do so, we emphasize that our jurisdiction is limited to the actual interstate cost of interconnection and

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58 The Supreme Court specifically observed that the cost allocation and ratemaking issues of Louisiana Pub. Serv. Comm'n v. FCC were distinguishable from cases such as NCUC I and NCUC II which upheld preemption in a context where the interstate and intrastate components of the FCC-asserted regulation were not separable. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375, n.4 (1986). Nothing in NCUC I or NCUC II suggests that the FCC may extend its jurisdiction to establish intrastate interconnection charges, where interstate and intrastate traffic can be identified and thus separated for ratemaking purposes. See NCUC I, at 793 ("We have no doubt that the provisions of section 2(b) [47 U.S.C. § 152(b)] deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications"); NCUC II at 1047 ("the FCC's registration program [which the court upheld] in no way purports to prescribe charges for local services; state commissions remain unfettered in their discretion to set rates for all local services and facilities provided by the telephone companies.")

> ensuring that interconnection is provided for interstate service."[59]

The express language of the statute, the courts' interpretations, and the Commission's own finding could not be clearer in recognizing the jurisdiction of the State commissions over intrastate interconnection charges. Before the FCC can preempt State regulation as it proposes to do here, it must meet three identified criteria: "(1) the matter to be regulated has both interstate and intrastate aspects [cite omitted]; (2) FCC preemption is necessary to protect a valid federal regulatory objective [cite omitted]; and (3) state regulation would 'negate ... the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects. (cite omitted)" Public Serv. Comm'n of Maryland v. FCC, 909 F.2d 1510, 1515 (D.C. Cir. 1990).[60] Nothing presented in the NPRM provides the basis necessary for this Commission to preempt the State commissions from this jurisdiction.

First, while it could be argued that physical interconnection has both interstate and intrastate aspects, the Commission has itself declared that CMRS service is inherently

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[59] In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Report No. CL-379 Declaratory Ruling, 2 FCC Rcd 2910, 2912 (1987).

[60] FCC can preempt State commission jurisdiction only to the extent necessary. See Public Util. Comm'n of Texas v. FCC, 886 F.2d 1325, 1333-1334 (D.C. Cir. 1989) (technological inseparability of interstate and intrastate calls is insufficient to justify pre-emption "unless that technological inseparability also prevents the FCC from separating its regulation into interstate and intrastate components").

local service and that intrastate charges should apply.[61] There has been no reasonable basis offered to reverse this conclusion for cellular service and, by the very nature of its "short-range" technology, PCS antennas are even less likely to serve multiple States. Second, Commission preemption cannot reasonably be argued to be necessary to protect a federal regulatory objective inasmuch as that objective, the development of CMRS is being achieved at explosive levels of growth. Third, as in the Louisiana PSC case, the Commission has itself concluded that interconnection charges can be unbundled into intrastate and interstate aspects.[62] In the instant case, the NPRM offers only that "much of the LEC-CMRS traffic that may appear to be intrastate may actually be interstate, because CMRS service areas often cross state lines, and CMRS customers are mobile" (NPRM ¶ 112). Here, the NPRM hypothesizes that the jurisdiction of a cellular call could be mistaken where "a cellular customer from Richmond travels to Baltimore and

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[61] "Part 22 licensees are common carriers generally engaged in the provision of local exchange telecommunications in conjunction with the local telephone companies and are therefore "co-carriers with the telephone companies." In the Matter of the Need to Promote Competition and Efficient Use of Spectrum For Radio Common Carrier Services, Memorandum Opinion and Order, 59 Rad. Reg 2d 1275 at ¶ 12 (1986). See, also, FCC Policy Statement on Interconnection of Cellular Systems (Appendix B, attached) at ¶ 5:

"Compensation Arrangements. In view of the fact that cellular carriers are generally engaged in the provision of local, intrastate, exchange telephone service, the compensation arrangements among cellular carriers and local telephone companies are largely a matter of state, not federal concern (cite omitted). Such matters are properly the subject of negotiations between the carriers as well as state regulatory jurisdiction. Compensation may, however, be paid under contract or tariff provided that the tariff is not an "access tariff" treating cellular carriers as interexchange carriers."

[62] "In the CMRS Second Report . . . [the Commission] further determined that costs associated with the provision of interconnection for interstate and intrastate service are segregable and did not preempt state regulation of LEC intrastate interconnection rates for CMRS and PRMS providers." Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service, 9 FCC Rcd at 5452, citing Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1497, 1501 (1994).

then places a call to Alexandria" thus potentially appearing to be an intrastate Virginia-to-Virginia call. While such "appearances" are possible, NYNEX understands that the cellular system in Baltimore "knows" that it is providing service for a Virginia calling number to a Virginia called number. The (in)frequency of such calling can be measured, as it is today by BANM, by means of periodic studies or other mutually-accepted methods. There has been no factual showing that CMRS providers cannot continue to provide LECs with a "percent interstate" determination of their traffic.[63]

The Commission has not articulated a convincing basis, such as a change in fact or applicable law since the Commission's 1987 statement in Report No. CL-379 (quoted above), which would effectively negate its ability to apply dual interstate and intrastate regulation of interconnection costs.

(2) OBRA Section 332 Does Not Provide A Basis For <u>Preempting State Authority Over Intrastate LEC Charges</u>

Those who assert that the Commission has preemptive jurisdiction argue that it can be found in the Omnibus Budget Reconciliation Act of 1993, within Section 332(c)(3),

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[63] Indeed, any absence of "measurability" is caused by the Commission's earlier determination that CMRS is "local" in nature, thus negating any cellular industry need for real-time measurement of jurisdiction on a call-by-call basis. This "incapacity by choice" cannot reasonably be used by carriers now to reverse that earlier Commission determination. Moreover, NYNEX understands that wireless carriers like the PCS providers will have available even greater call detail (including point-of-service information) as they build new systems including wireless adapted SS-7 protocols.

(NPRM ¶¶ 98-104).[64] That provision specifies that: "No State or local government shall have the authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service...." (emphasis added). Under such authority, this Commission has preempted State regulation of CMRS rates. But here, it is LEC rates and charges that are at issue. As BellSouth succinctly and properly stated, the statute grants the Commission preemptive authority with respect to *the rates charged by* CMRS providers, not *the rates charged to* CMRS providers.[65] This distinction is most starkly drawn by those who would ask this Commission to preempt intrastate LEC tariff rates such as those in many NYNEX States, but it applies as well to charges contained within agreements made under State supervision.

Plainly stated, Section 332(c) does not give the Commission authority to preempt State intrastate ratesetting for LECs. Importantly, the Commission itself has previously recognized that LEC interconnection should be regulated by the States:

> "[W]e note that Louisiana's regulation of the interconnection rates charged by landline telephone companies to CMRS providers appears to involve rate regulation only of the landline companies, not the CMRS providers, and thus does not appear to be circumscribed in any way by Section 332(c)(3)."[66]

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64 In Subsection 332 (c)(1)(B) the Commission's plenary jurisdiction to order interconnection is affirmed. Importantly, this authority is specifically directed to the establishment of "physical connections," and it is further noted that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection." Accordingly, this provision does not confer authority in the Commission to govern intrastate traffic over such physical connections.

65 Ex parte communication of BellSouth, dated December 7, 1995.

66 NPRM, ¶ 106, n.155 (citing Petition on Behalf of the Louisiana Pub. Serv. Comm'n, 10 FCC Rcd at 7908 (1995)).

This then is an area for State regulatory jurisdiction.

As the Commission notes (NPRM ¶ 111), some proponents of preemption have artfully erected a strawman which precludes any State regulation in this area, thus appearing to create a "void" that requires Commission action:

> "Amended Sections 332 and 2(b) rewrite the traditional boundaries of jurisdiction over mobile services. The states no longer enjoy rate and entry regulation authority over CMRS providers. Rather their authority is limited to overseeing the "terms and conditions" of CMRS and PMRS services provided to end users. The Budget Act thus eliminated state substantive jurisdiction over wireless common carrier services. Substantive regulation of CMRS has become federalized and, because jurisdiction over CMRS is no longer divided, authority over CMRS is no longer divided, authority over CMRS is no longer jurisdictionally split."[67]

This is not the law. Congress did not "federalize" all CMRS jurisdiction, nor did it specifically preempt the States' general authority or the dual jurisdictional approach embedded in the Act. This Commission is not presumptively authorized to fill a void because there is no void. Instead, Congress provided for federal preemption of State regulation specifically only over CMRS rates and as they [the States] might erect barriers to market entry. The Commission itself properly recognizes this fact in stating that its preemptive jurisdiction can be exercised "to the extent that such [state] regulation precludes (or effectively precludes) entry of CMRS providers . . ." and "to the extent state regulation in this area precludes reasonable interconnection" (NPRM ¶ 111). There is no evidentiary record that either of these conditions obtain at this time. As above, cellular carriers are timely

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[67] Ex parte communication of Cox Enterprises, dated October 16, 1995, at p. 2.

provided interconnection and at rates supervised by State commissions. Even assuming arguendo that LEC rates could be set so high as to effectively preclude market entry, there is no proof of such allegations herein. The same will be true for PCS providers.

(3) Dual Jurisdiction Over LEC Interconnection Charges Has Been Affirmed In The 1996 Act

If there were ever any reasonable doubt about State authority over intrastate LEC interconnection charges, this doubt has been removed by the 1996 Act. As above, Section 252 establishes that the State commissions are the regulators that will oversee intrastate LEC-CMRS interconnection charges. The role for this Commission is to set certain principles for interconnection and to step in if State commissions fail to act. The Commission may also choose to set a "model" for the State commissions in its establishment of interstate access charges, as discussed in Section IV, following.

IV. INTERCONNECTION FOR THE ORIGINATION AND TERMINATION OF INTERSTATE INTEREXCHANGE TRAFFIC (NPRM ¶¶ 115-117)

Next the NPRM indicates that the Commission is considering directing how IXCs and LECs will compensate CMRS providers from interstate access charges (NPRM ¶¶ 115-117) for interstate calls "when the LEC and CMRS provider jointly provide access service".[68] The Commission indicates that it tentatively concludes that CMRS providers should be entitled to collect access charges from IXCs and questions the appropriate bases for such charges. It also proposes to require that CMRS providers be treated like neighboring LECs or CAPs (competitive access providers) "with respect to recovery of access charges from IXCs" (NPRM ¶ 116).

Inasmuch as most of the NPRM has been rendered moot by the 1996 Act, it is doubtful that continuing this proceeding simply to determine a subset of LEC interstate

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[68] NPRM ¶ 115. As background, LECs are limited in the application of interstate access charges to CMRS providers:

> "Some cellular carriers provided their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is "roaming" in a cellular system in another state. In this case, the cellular carrier is providing not local exchange service but interstate, interexchange service. In this and other situations where cellular company is offering interstate, interexchange service, the local telephone ... may expect to be paid the appropriate access charge."

FCC Policy Statement on Interconnection of Cellular Systems, supra at n. 3.

access charges would be an economical use of limited Commission resources. This point is further reinforced by the Commission's own plan to conduct an overall Access Charge Reform Proceeding in the near future, as an essential part of the Commission's efforts to establish the future guidelines for fair and efficient competition. That proceeding would be made more effective by incorporating all access charge issues, without carving out or setting aside ad hoc exceptions in advance:

> "As competition begins to take hold in local exchange and access markets, I believe our access charge rules may become counterproductive. To the extent that regulation pushes access rates well above the relevant costs of providing access service, bad things begin to happen ....
>
> "The FCC is beginning to address the problem. We are doing so on a case-by-case basis through waivers of our access charge rules in areas such as New York, where access competition is advancing more rapidly than in other locations."
>
> "But this is not a satisfactory or efficient approach to the underlying problem. We need comprehensive access charge reform, where everything is on the table and subject to debate. The Commission plans to address access charge reform in the near future."[69] (emphasis in original)

Nevertheless, the Commission may decide to determine the level of charges properly due from IXCs to CMRS providers in this proceeding. If it does so, it should begin from its existing LEC-IXC charges. The Commission has already determined that LECs may not charge IXCs for Carrier Common Line charges calls involving CMRS providers and may not charge the Local Switching Element on Type 2 connections

[69] Remarks of Commissioner Rachelle B. Chong Before the Practicing Law Institute and the Federal Communications Bar Association: Washington, D.C., delivered December 14, 1995.

(where CMRS providers offer this function).[70] These elements could presumably be charged to IXCs directly by CMRS providers or via the LECs using the pricing of current LEC-IXC levels. The NYNEX Companies would be willing to negotiate the administrative collection of such CMRS charges upon the authorization of this Commission. Thereafter, those CMRS providers that wished to "prove-in" a higher set of reasonable charges could do so, either in intercarrier agreements with IXCs or before this Commission for the interstate traffic involved.

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[70] In The Matter of Bell Atlantic Telephone Companies, Revisions To Tariff F.C.C. No. 1, Order, 6 FCC Rcd 4794 (1991).